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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In Re Applications of	)	MM Docket No. <u>93-75</u>
TRINITY BROADCASTING OF FLORIDA,	)	
INC.	)	BRCT-911001LY
For Renewal of License for	)	
Television Station WHFT(TV)	)	
Miami, Florida	)	
GLENDAL E BROADCASTING COMPANY	)	BPCT-911227KE
For Construction Permit	)	
Miami, Florida	)	

To: Hon. Joseph Chachkin  
Administrative Law Judge

**REPLY TO OPPOSITION TO  
SECOND MOTION TO ENLARGE ISSUES**

Trinity Broadcasting of Florida, Inc. ("TBF"), by its counsel, pursuant to Section 1.294(c)(1) of the Commission's Rules, hereby replies to the "Opposition to Second Motion To Enlarge Issues" filed by Glendale Broadcasting Company ("Glendale") on September 15, 1993.

**A. Introduction**

1. TBF moved for an issue against Glendale to determine whether Raystay Company ("Raystay"), which is controlled by George F. Gardner, in January 1992 falsely certified to the Commission expenses supposedly incurred in acquiring an unbuilt LPTV construction permit for Red Lion/York, Pennsylvania. Based

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on internal Raystay documents, TBF demonstrated that Raystay claimed \$10,498 in legal, engineering, and filing fee costs for the permit in question when its actual costs for those items came to only \$4,979.41. TBF further showed that by inflating the expense claim to just over \$10,000, Raystay induced the Commission to approve the full \$10,000 price that the buyer was willing to pay for the permit. In this way, Raystay evaded the Commission's rule limiting payment for an unbuilt construction permit, and reaped more than twice the allowable amount.<sup>1/</sup>

2. In its Opposition, Glendale professes to see nothing wrong with what Raystay did. According to Glendale, Raystay could permissibly allocate to the York permit alone fully one-third of the total engineering costs and one-half of the total legal costs for five permits. Such an allocation was justified, says Glendale, because (a) the engineering involved three sites (not five) and (b) "seventy-five to eighty percent" of the total legal fees would have been charged if the York application had been the only application. Opposition, p. 6. Moreover, Glendale argues, no Commission authority indicates that Raystay's allocation method was inappropriate. Id., p. 5.

3. As shown below, this defense is untenable and simply a slick excuse for a dishonest certification. Under Section

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<sup>1/</sup> The Mass Media Bureau supports designation of the requested issue absent a satisfactory explanation by Glendale. See "Mass Media Bureau Comments in Support of Second Motion To Enlarge Issues," filed September 15, 1993.

73.3597(c)(2) and the case law, the expense allocation theory advanced by Glendale is not proper. Furthermore, because Raystay did not disclose the pertinent facts at the time, the Commission had no idea that the expenses Raystay was claiming for the York permit were actually shared expenses for multiple permits. Finally, the facts do not fit Glendale's theory in any event, because what Glendale says "could" or "would" have been billed to Raystay for the York permit alone is not what was billed. Creative rationalization can neither change the facts nor hide the now-obvious lack of candor by which Raystay successfully induced the Commission to approve unlawful compensation for an unbuilt permit.

#### B. Argument

4. Contrary to Glendale's contention, both the rule and the case law clearly indicate that where common costs are incurred for multiple permits, the seller may not evade the expense reimbursement limitation by claiming all (or most) of the total costs for the lone permit being sold. Section 73.3597(c)(2) expressly limits payment to amounts expended "solely for preparing, filing, and advocating the grant of the construction permit for the station . . . ." (Emphasis added.) This restrictive language reflects a Commission policy to narrow (not broaden) the claimable expenses. Such policy obviously disfavors stacking the allocation if the costs are equally attributable to several other stations that are not being sold.

5. A pro-rata allocation in such situations finds clear precedent under the case law. In Integrated Communications Systems, Inc. of Massachusetts, 5 RR 2d 725, 726-27 (Rev. Bd. 1965), an applicant had incurred legal costs for the preparation and prosecution of three television applications, one of which it was now dismissing for reimbursement. The amount allocated by the applicant as legal costs for the dismissed application "was arrived at by taking one-third of the total billing for legal service in connection with all three applications." Id. at 726. In other words, the legal costs were pro-rated equally among the multiple applications. The Review Board held that allocation to be appropriate. Id. at 727.

6. Under that precedent, and with no legal authority for a different method (Glendale cites none), Raystay was plainly disingenuous in certifying more than one-fifth of its total legal and engineering costs as York expenses. It got away with the scam because its certification was silent about the other LPTV permits. Far from revealing to the Commission that the claimed legal and engineering costs were shared by other permits, Raystay implied just the opposite. It said that the expenses it was claiming were incurred in obtaining "the construction permit being assigned." This unquestionably created the false impression that the listed expenses were exclusive to the York permit.

7. The circumstances belie Glendale's claim that Raystay was acting in good faith. Opposition, p. 8. Given the legal authority cited above, good faith would have dictated at the very least that Raystay disclose all the pertinent facts so the Commission could make an informed judgment about Raystay's "allocation." Had Raystay truly believed that its certification of expenses was legitimate, and had it wanted to be candid, it would have told the Commission about the other four LPTV permits, explained its allocation theory, submitted its legal and engineering bills to document its claim, and asked for approval. It did none of those things. Instead, it created a highly misleading impression and withheld critical facts. That, standing alone, is clear evidence of Raystay's bad faith.

8. Additional evidence of bad faith is supplied by the engineering invoice in Raystay's possession when it certified \$2,425 in engineering fees. That invoice shows on its face that Raystay was not billed \$2,425 for the York application, but was billed only \$1,525 (i.e., \$1,500 minus 10% discount [\$150] = \$1,350 plus \$175 for FAA form = \$1,525).<sup>2/</sup> Since the engineer himself specified that only \$1,525 of his total charge pertained to the York permit, Raystay could not in good faith claim to have "incurred" more than \$1,525. Its certification of \$2,425 was flatly contradicted by the invoice, and Raystay plainly knew

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<sup>2/</sup> See TBF's "Second Motion To Enlarge Issues Against Glendale Broadcasting Company," Attachment 5.

it. Had Raystay submitted the invoice, the Commission would have known it too -- which explains, of course, why Raystay withheld the invoice.

9. In other important respects, as well, Glendale's rationalization does not survive the facts. Seeking to justify Raystay's lopsided allocation of legal expenses, Glendale asserts: "If Cohen and Berfield had performed the same services with respect to only one application, the charges would have been at least seventy-five to eighty percent of the \$15,397.03 charged for the five applications." Opposition, pp. 4-5 (emphasis added).<sup>3/</sup> However, this post hoc claim does not match what Raystay did at the time -- which was to list exactly half of the total legal fees, not the 75% or 80% that Glendale says would have been justified. Quite obviously, Raystay was not making a reasoned allocation at all, but was simply arbitrarily picking a figure that would get it over \$10,000.

10. Furthermore, Glendale's claim that the York permit would have incurred most of the charges by itself implies that Raystay would have filed for only one LPTV permit (rather than five) in the first place. Yet, Glendale makes no factual showing to that effect. And the available evidence strongly

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<sup>3/</sup> Glendale does not document this claim with copies of the law firm's bills or other internal documents that would reflect the amount, nature, and allocation of the legal work done on Raystay's LPTV applications/permits.

indicates that Raystay would not have undertaken the LPTV project at all unless multiple permits were involved.

11. As shown by company documents, Raystay's concept was to establish a regional group of LPTV stations. The business plan, referring collectively to Raystay's existing LPTV station and the five new permits, said, "This group of stations represents a viable competitive media group in Dauphin, York, Cumberland, Lancaster and Lebanon counties. . ." The business plan further stated that "this group of stations offer a unique opportunity to regional and local advertisers. . ."4/ Another memorandum observed that Raystay's "new program concept will be made possible through the activation of five (5) new low power television broadcast stations. . ."5/ From this it is clear that Raystay considered multiple LPTV authorizations essential to the premise and viability of its undertaking.

12. This evidence shows it is highly unlikely that Raystay would have sought any of the new permits except as a group. Hence, Glendale may not be heard to argue that Raystay's disproportionate allocation of costs to the York permit was proper because those costs would have been incurred if York had been the only permit. Moreover, the fact remains that Raystay

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4/ See "Low Power TV Business Plan," p. 1 (emphasis added) (Attachment 1 hereto). This document was produced by Glendale in this proceeding.

5/ See "Memorandum" dated 1/15/91 (Attachment 2 hereto) (produced in this proceeding by Glendale).

filed five LPTV applications, not one, and the legal costs pertained to five applications, not one. Since those are the facts, Glendale gains nothing by arguing what would have been the case if the facts had been different.

13. Trying as always to distance George Gardner from Raystay's misconduct, Glendale makes the astonishing suggestion that Gardner might not have known what Raystay said in the York LPTV assignment application. Opposition, n. 4 (at pp. 8-9). To be sure, Glendale does not deny that Gardner knew. Rather, it says that Gardner's 1990 pledge to the Commission -- that he would "carefully review" all future Raystay applications and statements "to ensure that they fully and accurately disclose any pertinent facts" -- does not (in Glendale's words) "competently demonstrate" that Gardner knew of the statements in question. However, Gardner's pledge certainly does establish a presumption (unrebutted by Glendale) that Gardner carefully reviewed the York LPTV assignment before it was filed. Further, Gardner expressly reaffirmed his 1990 pledge in February 1992, a month after Raystay filed the York application, in the "rehabilitation" showing Glendale made in its application for Monroe, Georgia.<sup>6/</sup> Thus, Gardner implicitly represented in the Monroe application that in fact he had carefully reviewed the

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<sup>6/</sup> BPCT-920228KE, Exhibit 2, p. 3 ("The applicant [Glendale] expressly reaffirms the affirmative showing of rehabilitation and good character accepted by the Mass Media Bureau in 1990") (Attachment 3 hereto).



York application for accuracy and full disclosure. This is prima facie evidence that Gardner knew at the time exactly what Raystay was telling the Commission in the York application.

14. Raystay's false expense certification is particularly significant in two respects. First, it reflects a willingness to flout the rules and mislead the Commission for even a small financial gain -- in this case about \$5,000. That was all Raystay stood to forego if it had candidly disclosed all the pertinent facts so the Commission could make an informed judgment on the expense claim. For the few extra dollars, it chose to conceal the facts and create a false impression.

15. Second, the lack of candor in the York application (filed January 1992) mirrors similar lack of candor in Raystay's LPTV extension applications (filed December 1991 and again in July 1992), which is already the subject of a designated issue in this proceeding. All of these episodes follow in the wake of the Commission's finding that George Gardner was already guilty of misrepresentations and lack of candor involving his earlier Fort Lauderdale application.

16. In this context, the York misconduct raises singularly troubling questions about Gardner's veracity and reliability. Not only does it demonstrate by itself an unsavory propensity for deception, but it forms part of an emerging pattern of deception across a range of FCC applications. Moreover, it

comes when Gardner is under "heightened scrutiny" due to his past adjudicated misconduct. These circumstances provide special reason for designating an issue on the York matter.

17. Accordingly, the requested issue should be designated for hearing in this proceeding. If there is insufficient time to schedule the issue for trial at the session that begins November 29, 1993, a second phase could be scheduled for later, or the issue could be tried in the Monroe proceeding (MM Docket No. 93-156), now scheduled for April 18, 1994.

Respectfully submitted,

TRINITY BROADCASTING OF FLORIDA,  
INC.

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September 22, 1993



Draft H

## Low Power TV Business Plan

Date: February 12, 1991

N Raystay presently operates one (1) low power television station located in Carlisle, Penna., serving the Harrisburg area; and holds ~~five (5)~~ construction permits for another five (5) low power television stations capable of serving the Lancaster, Lebanon and York areas. These stations, when all become operational, will have a contiguous coverage area of approximately 340,000 homes including approximately 240,000 cable subscribers. The stations may be operated independently, simultaneously as a group network or in any combination(s) preferred.

N This group of stations represents a viable competitive media group in Dauphin, York, Cumberland, Lancaster and Lebanon counties, and could be viewed in Berks county by Berks Cable TV subscribers if the cable system elected to carry the signal. To become a viable outlet for area advertisers it is necessary to have access to the major cable system operators in the area. These operators are ATC in the Lebanon area, The Lemfest Group in the Lancaster area, Susquehanna Broadcasting in the York area and Sammons in the Harrisburg area. In addition to the above, Warner and Raystay would add another 40,000 to 50,000 subscribers.

With access to these cable systems this group of stations offer a unique opportunity to regional and local advertisers as they can reach the larger regional market or anyone of six smaller markets. Consequently, with the right program package a unique niche can be created in the media marketplace.

We propose to offer cable operators an alternative program source to the current movie services such as Nostalgia and American Movie Classics. We will also provide advertising avails for promotional use. In addition we can offer local origination of significant interest local events such as parades, social gatherings, political debates and sports, if this is determined to be in our best interest.

The combination of programming and commercial access offers cable operators the opportunity to reduce their operating costs by eliminating the program fees paid for current movie services and provides access to their current subscribers and non-subscribers for marketing their

services through broadcast television. We believe that cable operators will find this opportunity very attractive. And, this offer eliminates the cable operators chief reason for not adding new channels: the lack of channel capacity, as we are enabling them to replace a channel and save operating dollars in the process. The chief obstacle to this offer will be a cable operators ability to cancel his commitment to his existing movie channel provider.

To make this concept work we need to develop the programming package and staff, a sales staff to sell advertising and a marketing plan to sell the concept to cable operators. Much of the preliminary work in these area has been accomplished. A preliminary meeting has been held with the four largest operators. Their response was very positive. Additional meetings are planned for February and March. Contact has been made with Cable AdNet to sell the advertising and they are very interested and have presented the concept to their board. The program package has been discussed with persons knowledgeable in the field of purchasing and packaging programming for television stations. I have proposed a joint venture company which would purchase and package the programming and develop a marketing package for possible syndication of the entire concept to other low power television station operators. While expanding this concept is premature it is appropriate to consider how the program could be made available for the future.

Our timetable for development is as follows:

February through May--Contact cable operators and obtain their commitment to carry the stations when they are active. Contact interested parties to create a joint venture in the program development and distribution company. Develop budgets and identify funding sources. Obtain a firm commitment from Cable AdNet to sell advertising.

June through July--Finalize funding sources. Identify and lease or purchase transmitter sites. Design and order towers and transmission equipment. Finalize program package concept and hire personnel if required.

August through September--finalize any of the above activities as necessary.

October through November--Contact potential advertisers. Begin marketing and public relations. Finalize program contracts.


December--Turn on stations.

HAL

75144



Memorandum

Date: 1/15/91  
 To: Bryan Sweeney  
 From: Harold Etsell, Jr.   
 cc: George Gardner  
 Lee Sandifer  
 Subject: W40AF dba TV40--History and Future

TV40 was granted a construction permit by the FCC on January 26, 1988, was licensed October 31, 1988 and began operations on December 16, 1988. TV40 is a low power television broadcast station with a broadcast radius of approximately 18 miles. Low power television broadcast stations were licensed by the FCC to serve limited small markets. The business purpose of TV40 was to provide new sources of revenue to Raystay Co. in a newly licensed type of television broadcast station which was perceived to have substantial future revenue potential and value. This revenue potential was to be developed through advertising sales of programming designed to serve small geographic areas with local programming not provided by the larger market television broadcast stations previously licensed by the FCC. Consequently, the start up cost of operations and program development for this type of station was expected to be substantial in the beginning two to three years of operation as a new market niche had to be developed.

To be successful any television broadcast station must develop and purchase programming to serve the interests in its markets. However, in addition to this, a television station must also successfully convince Cable TV companies that its benefits to cable subscribers is sufficient to warrant carriage as cable companies are not required to carry any television broadcast station. To date TV40 is carried in about twenty (20%) percent of the cabled homes in its signal coverage area.

Over the past two years TV40 has developed its production and operating staff, created an advertising sales department and local programming; some of which is syndicated nationally and one of which has received a national award for excellence. In addition, we are presently negotiating a program contract that has the potential to significantly improve our fiscal 1991 actual performance as compared to our existing budget.

We have also developed a new programming concept which we intend to implement in late 1991. This new program concept will be made possible through the activation of five (5) new low power television broadcast stations, with a potential to cover a market of 300,000 homes, which will require only minimal additional staff due to the potential to remotely control programming from our existing facilities.

This new programming concept has been reviewed preliminarily by the major Cable TV operators in the expanded service area. Early indications are that we may be carried by cable systems with 240,000 subscribers immediately upon turn on of the additional five (5) stations.

It is believed that this new programming format and the potential for advertising sales with the additional potential viewers will generate sufficient income to break even in the first year, and show a profit in the second year for all six (6) low power television broadcast stations.





LAW OFFICES  
COHEN AND BERFIELD, P.C.

BOARD OF TRADE BUILDING

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LEWIS I. COHEN  
MORTON L. BERFIELD  
ROY W. BOYCE  
JOHN J. SCHAUBLE\*

\*VIRGINIA BAR ONLY

February 27, 1992

Federal Communications Commission  
Mass Media Services  
P.O. Box 358165  
Pittsburgh, PA 15251-5165

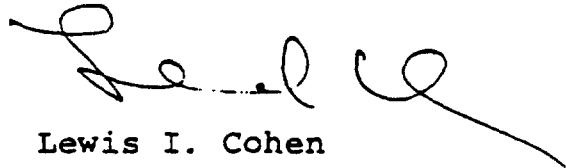
Dear Sir/Madam:

On behalf of Glendale Broadcasting Company, we are submitting an original and two copies of an application for a construction permit for a new commercial television station on Channel 63 at Monroe, Georgia. The tendered application is timely filed pursuant to Section 73.3516(e) of the Commission's rules and is mutually exclusive with the pending renewal application of WHSG-TV, Monroe, Georgia.

A check for \$2,535 is enclosed as payment of the hearing fee, along with FCC Form 155.

Should there be any questions, kindly communicate directly with this office.

Respectfully submitted,



Lewis I. Cohen

Enclosures

APPLICATION FOR CONSTRUCTION PERMIT FOR COMMERCIAL BROADCAST STATION

For COMMISSION Fee Use Only	FEE NO:	For APPLICANT Fee Use Only
	FEE TYPE	Is a fee submitted with this application? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
	FEE AMT:	If fee exempt (see 47 C.F.R. Section 1.1112), indicate reason therefor (check one box): <input type="checkbox"/> Noncommercial educational licensee <input type="checkbox"/> Governmental entity
	ID SEQ:	FOR COMMISSION USE ONLY FILE NO.

Section I - GENERAL INFORMATION

1. Name of Applicant  GLENDALE BROADCASTING COMPANY			Send notices and communications to the following person at the address below: *		
Street Address or P.O. Box P.O. Box 38			Name  George F. Gardner		
City Carlisle	State PA	ZIP Code 17013	City Carlisle	State PA	ZIP Code 17013
Telephone No. (Include Area Code) (717) 245-2723			Telephone No. (Include Area Code) (717) 245-2723		

2. This application is for: ☐ AM ☐ FM ☒ TV

(a) Channel No. or Frequency  63	(b) Principal Community  Monroe	City  Monroe	State  GA
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(c) Check one of the following boxes:

☒ Application for NEW station

☐ MAJOR change in licensed facilities; call sign: \_\_\_\_\_

☐ MINOR change in licensed facilities; call sign: \_\_\_\_\_

☐ MAJOR modification of construction permit; call sign: \_\_\_\_\_

File No. of construction permit: \_\_\_\_\_

☐ MINOR modification of construction permit; call sign: \_\_\_\_\_

File No. of construction permit: \_\_\_\_\_

☐ AMENDMENT to pending application: Application file number: \_\_\_\_\_

NOTE: It is not necessary to use this form to amend a previously filed application. Should you do so, however, please submit only Section I and those other portions of the form that contain the amended information.

3. Is this application mutually exclusive with a renewal application? ☒ Yes ☐ No

If Yes, state:	Call letters  WHSB	Community of License  Monroe	State  GA
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EXHIBIT 2

George F. Gardner is the controlling stockholder of Raystay Company which is the licensee of low power television station W40AF at Dillsburg, PA. Raystay is also the permittee of the following low power television stations:

<u>Call Letters</u>	<u>Location</u>
W38BE	Lebanon, PA
W55BP	Lebanon, PA
W23AY	York, PA
W31AX	Lancaster, PA
W23AW	Lancaster, PA

On January 14, 1992, Raystay Company filed an application for the Commission's consent to assign the construction permit for LPTV station W23AY at York, Pennsylvania from Raystay Company to GroSat Broadcasting, Inc. (File No. BAPTTL-920114IB). If the application of Glendale Broadcasting Company is granted, Raystay Company will divest any interest it has in W23AY prior to the commencement of program test authority by Glendale.

Mary Anne Adams is the trustee for her two sons, Patrick Joseph Molle and Gregory George Molle. Each son owns 8.5% of the Class B non-voting stock of Raystay.

Raystay Company was the owner and operator of standard broadcast station WEEO in Waynesboro, PA from January 1971 to February 1980 and from August 1983 to October 1984. Raystay Company operated standard broadcast station WTOO in Toledo, OH from November 1973 to August 1976.

George F. Gardner was the controlling stockholder of West Shore Broadcasting Co., Inc., which owned and operated FM broadcast station WQVE in Mechanicsburg, PA from 1978 to August 1982.

George F. Gardner was a limited partner in Los Angeles Television, a Limited Partnership (LATV). LATV was an applicant for a construction permit for a new commercial television station seeking the facilities of KHJ-TV, Los Angeles, California. In RKO General, Inc., 3 FCC Rcd 5057, 65 RR 2d 192 (1988), the Commission dismissed LPTV's application as unacceptable for filing. A second application for the same facilities (File No. BPCT-881028KG) was dismissed by the Commission in RKO General, Inc. (KHJ-TV), 4 FCC Rcd 1304, 65 RR 2d 1548 (1989). LATV appealed the Commission's actions to the U.S. Court of Appeals. LATV then dismissed its appeal pursuant to an Agreement to Dismiss Appeal dated August 3, 1989.

George F. Gardner was the sole stockholder of Adwave Company, an applicant for a construction permit for a new FM broadcast station on Channel 290 at Fort Lauderdale, FL (File No. BPH-830510AL). In RKO General, Inc., 4 FCC Rcd 4679, 66 RR 2d 1162 (Rev. Bd. 1989), the Review Board, with Board Member Blumenthal dissenting, disqualified Adwave because it resolved a misrepresentation/lack of candor issue involving a divestiture

commitment by George F. Gardner, Adwave's sole stockholder, adversely to Adwave. In RKO General, Inc. (WAXY-FM), 5 FCC Rcd 642, 67 RR 2d 508 (1990), the Commission approved a settlement agreement dismissing Adwave's application.

The Commission ruled that George F. Gardner could submit a specific showing of good character in support of future applications he might file with the Commission. Such a showing was made and accepted with respect to the low power television stations of which Raystay is now a permittee. See letter dated July 23, 1990 to George F. Gardner signed by Roy J. Stewart, Chief of the Mass Media Bureau (in re BPTTL-890309NX, Red Lion, PA, et. al.). The applicant reaffirms the affirmative showing of rehabilitation and good character accepted by the Mass Media Bureau in 1990. Furthermore, since the filing of the Adwave application in 1983, no allegations have been made of any significant misconduct of any kind by George F. Gardner, or any company with which he has been involved. Furthermore, he is aware of no such misconduct.

On December 27, 1991 the applicant filed an application (File No. BPCT-911227KE) for a new commercial television station on Channel 45 at Miami, Florida. The application is mutually exclusive with the pending renewal application of WHFT Miami, Florida.

CERTIFICATE OF SERVICE

I, Nathaniel F. Emmons of the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that on this 24th day of September, 1993, copies of the foregoing "Reply to Opposition to Second Motion To enlarge Issues" were sent by first class mail, postage prepaid, to the following:

\* The Honorable Joseph Chachkin  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.--Room 226  
Washington, D.C. 20554

\* James Shook, Esq.  
Gary Schonman, Esq.  
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Federal Communications Commission  
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Washington, D.C. 20010

\_\_\_\_\_  
Nathaniel F. Emmons

\_\_\_\_\_  
\* Hand Delivered

CERTIFICATE OF SERVICE

I, Nathaniel F. Emmons of the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that on this 22nd day of September, 1993, copies of the foregoing "Reply to Opposition to Second Motion To enlarge Issues" were sent by first class mail, postage prepaid, to the following:

\* The Honorable Joseph Chachkin  
Administrative Law Judge  
Federal Communications Commission  
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